United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1428

To be argued by
JAMES A. MOSS

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1428

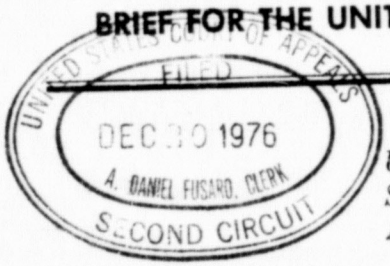
UNITED STATES OF AMERICA,
Appellee,

—*v.*—

WILLIAM M. ORDNER, JR.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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Preliminary Statement

William M. Ordner, Jr. appeals from a judgment of conviction entered on July 31, 1976 in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment 76 Cr. 222, filed March 2, 1976, charged Ordner in six counts with various violations of the Gun Control Act of 1968 (Title 26, United States Code, Sections 5811, *et seq.*). Counts One and Three charged that Ordner illegally possessed one unserialed "pen gun" and 502 unserialed "pen guns," respectively, in violation of Title 26, United States Code, Sections 5842, 5845, 5861 and 5871. Counts Two and Four charged that Ordner illegally transferred one unserialed "pen gun" and 502 unserialed "pen guns," respectively, in violation

of Title 26, United States Code, Sections 5811, 5812, 5845, 5861 and 5871. Count Five charged that Ordner illegally possessed three pineapple-type hand grenades, in violation of Title 26, United States Code, Sections 5845, 5861, and 5871. Count Six charged that Ordner illegally transferred these three hand grenades illegally, in violation of Title 26, United States Code, Sections 5811, 5812, 5845, 5861 and 5871.

The trial commenced on July 26, 1976 and concluded on July 31, 1976, when the jury returned guilty verdicts as to Counts One, Two and Three, and not guilty verdicts as to Counts Five and Six.*

On September 16, 1976, Judge Ward sentenced Ordner to concurrent terms of imprisonment of ten years on each of Counts One, Two and Three, pending the results of a 90-day psychiatric study pursuant to Title 18, United States Code, Section 4205(b). The Court further ordered that execution of this sentence be stayed pending appeal.

Ordner is presently at liberty on bail pending appeal.

Statement of Facts

The Government's Case

1. Special Agent Kelly's Testimony

The Government called as its first witness Special Agent Joseph Kelly, of the United States Treasury Department's Bureau of Alcohol, Tobacco and Firearms. Agent Kelly testified about the undercover investigation of Ordner carried out by himself and by other law enforcement personnel.

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* Count Four had been dismissed by Judge Ward at the close of the Government's case-in-chief.

Agent Kelly first met Ordner in Armonk, New York on August 25, 1975, at the residence of Anthony Stagg, a Government informant. (Tr. 29-31).* Ordner was escorted to this meeting by John Romano, another informant, who introduced Ordner to Stagg, Agent Kelly, and the two other persons at the meeting: Police Officer William Adams, of the local police department, and Special Agent Kenneth Waxman. Agent Kelly was introduced to Ordner as "Joe Keen." (Tr. 31-33).

During this first meeting with Ordner, these law enforcement officers pretended to be members of an organized crime "family" headed by Stagg. Ordner was told that the "family" was looking for weapons to sell. Ordner told Stagg that in the past he had dealt in weapons but that he would have to reestablish his contacts before he could make any commitments to Stagg. (Tr. 34). Before leaving, Ordner made a present to Stagg of some napalm that he had brought with him to the meeting. (Tr. 34-35).

Kelly, Stagg and Adams met with Ordner again in Brooklyn, New York on September 23, 1975, after attending the wake of John Romano, who had died of a liver ailment. (Tr. 35-36). During that second meeting, Stagg offered Romano's place in the "organization" to Ordner, who asked for time to consider the offer. (Tr. 37).

On the following day Ordner met for a third time with Kelly, Stagg and Adams at Stagg's Armonk residence. Ordner said that he could supply the "family" with large numbers of pen guns. (Tr. 38-39). Ordner quoted a price of $2 for each pen gun he would supply,

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* References to the trial transcript are abbreviated herein as "Tr."; to Government exhibits as "GX"; and to Ordner's Brief as "Br."

noting that since the pen guns were illegal they could be resold for $25 apiece on the street. (Tr. 39-40). At the same time, Ordner produced a blueprint (GX 1) of a barrel he had personally designed which would convert a standard flare launcher into a .25 caliber pen gun. Ordner estimated that he could have these barrels manufactured for fifty cents apiece. (Tr. 40). Ordner also stated that he knew of a person in New Jersey who could supply about 750 flare launchers, to be used as the bodies of the pen guns. (Tr. 39). Kelly asked Ordner for a sample pen gun "to show to my street contacts." (Tr. 41).

On the following afternoon, September 25, 1975, Ordner returned to Stagg's residence with a flare launcher and a .25 caliber barrel and explained to Stagg and Kelly that these were the components of a pen gun. (Tr. 42-43). After Agent Kelly had screwed the barrel onto the flare launcher, Ordner instructed Kelly in the operation of the constructed pen gun. (GX 2). Ordner loaded the pen gun with a .25 caliber bullet and test fired it into the ground outside Stagg's home. (Tr. 43-44). Following the test firing, several telephone calls were placed by Ordner and Kelly in an attempt to locate a supplier of flare launchers. Eventually, Ordner succeeded in reaching a Mr. Dolan in Neptune, New Jersey, who maintained a stock of 1,000 flare launchers. Ordner predicted to Kelly that he could have 750 to 1,000 barrels manufactured within one week. Ordner then departed, leaving the pen gun. (Tr. 45-46).

On October 7, 1975, Ordner returned to Armonk in order to pick up Kelly and Adams, and then to travel to Neptune, New Jersey to purchase the flare launchers. Ordner arrived at Stagg's residence with a second blueprint of the .25 caliber barrel (GX 4), a manual on silencers, a stainless steel submachine gun, a bazooka

launcher triggering device (which Ordner called a "bazooka energizer") and two unpacked 60mm mortar shell casings. (Tr. 51-53). Ordner said that he possessed diagrams for every silencer listed in the silencer manual, that he was trying to locate parts in order to assemble forty complete bazooka units, and that he was also working on a deal to supply the Stagg organization with 2,500 hand grenades. (Tr. 52-53).

Ordner, Kelly and Adams then drove from Armonk to Mr. Dolan's home in Neptune, New Jersey, where Kelly purchased approximately 500 flare launchers. During this trip, and the return to Armonk, Ordner discussed a variety of weapons he might supply to the Stagg organization. (Tr. 54-57).* Upon his return to Armonk, Ordner received $66 from Agent Kelly as reimbursement for the cost of the blueprints. Ordner then departed, taking with him six flare launchers as test samples for the manufacture of the .25 caliber barrels. (Tr. 65).

Ordner next met with Agent Kelly and Stagg on October 10, 1975 at Stagg's residence in New York. At this meeting, Ordner produced a Mark VIII submachine gun, which he claimed to have manufactured himself. Ordner test fired the gun in Stagg's backyard and said that he would supply 10,000 such units for $35 apiece. (Tr. 99-101). Ordner next produced a .45 caliber single-shot "Assassin's Pistol," which he offered to supply to Stagg in unlimited quantities for $6 apiece. (Tr. 101).

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* A substantial portion of this conversation was recorded by a "Nagra" body tape recorder that Agent Kelly was wearing. A copy of this tape (GX 5) was played for the jury during Agent Kelly's direct testimony; a transcript of this tape (GX 6) was provided to each juror as an aid to understanding the tape. (Tr. 65-68, 81-82). The substance of the conversation recorded on GX 5 is summarized *infra*.

Finally, Ordner produced a .22 caliber Ruger semi-automatic pistol which he sold to Agent Kelly. Kelly gave Ordner $300 to cover the price of the pistol and part of the cost of machining the barrels for the pen guns. (Tr. 101-02).

On October 16, 1975, Ordner returned to Stagg's home with a box containing approximately 500 barrels for the pen guns. (Tr. 105-07). Ordner sat down at a kitchen table with Kelly, Stagg and Adams and helped to screw these barrels onto the ends of the 502 flare launchers that had been purchased the week before in Neptune, New Jersey. After all of the pen guns (GX 8) had been assembled, Ordner selected ten at random, took these outside and test fired them. (Tr. 107-08, 271-73). Then Agent Kelly paid Ordner $50 as the balance of the cost of machining the barrels and $1,000 as the price for the completed pen guns. (Tr. 108-09). Before he left, Ordner proposed a future deal whereby Ordner would supply the Stagg organization with 2,500 hand grenades. (Tr. 110).

Three weeks later, on November 8, 1975, Ordner arrived at Stagg's residence with three live pineapple-type hand grenades packed in coffee cans. (Tr. 134-36). Ordner explained to Kelly, Stagg and Adams how he had assembled each of the genades. He lit a sample fuse, which he claimed he had devised himself. (Tr. 137-38). Ordner told Kelly that he would manufacture a minimum of 3,000 hand grenades for the Stagg organization, at a price of $12 apiece. (Tr. 139). Arrangements were made for another meeting, which was never held. (Tr. 139).

On December 17, 1975, Ordner was arrested in Armonk, New York. (Tr. 142-43). At no time during any of the above meetings was Ordner threatened or coerced to participate in these criminal ventures. (Tr. 204-06).

2. The October 7, 1975 Tape Recording

During the direct testimony of Agent Kelly, a tape recording of the October 7, 1975 trip from Armonk, New York to Neptune, New Jersey was played for the jury. (GX 5). At the same time, the jury was given a 114-page transcript as an aid to understanding the tape. (GX 6). The recording captured the entire transaction in Neptune, New Jersey, during which approximately 500 flare launchers were inspected by Ordner and purchased by Agent Kelly (GX 6, at 88-102), and a substantial portion of the conversation between Ordner and Kelly that took place during their automobile trip to, and from, Neptune. The tape revealed that not only did Ordner extensively discuss the pen gun transaction itself (GX 6, at 15-21, 28-30, 44-46, 56-58, 62-65, 67-69, 85, 103-06, 107-11), but he also offered to furnish a multitude of other weapons to the Stagg organization. In the course of this conversation, Ordner offered to supply the following firearms and destructive devices to the Stagg organization:

—2500 hand grenades (GX 6, at 6, 9-11, 30-31, 50-52, 58-59, 82);

—600 bazookas (GX 6, at 31-32);

—.50 caliber machine guns (GX 6, at 32-34);

—Eagle Carbine automatic rifles (GX 6, at 36-37);

—5,000 mortars (GX 6, at 37-38, 69);

—single-shot derringers (GX 6, at 46-48);

—a magazine of "outdated" explosives (GX 6, at 48-50);

—10,000 submachine guns (GX 6, at 52-54, 60-61);

—a 9 mm "shooting gavel" (GX 6, at 54-55);

—.45 caliber "Liberator" pistols (GX 6, at 74-75);

—Mark VIII submachine guns (GX 6, at 75-76);

—satchel charge "time bombs" (GX 6, at 77-78);

—"exploding light bulbs" (GX 6, at 106);

—a "minimum" order of fifty sawed-off 20-gauge shotguns (GX 6, at 112-14).

3. Other Government Witnesses

Special Agent Kenneth Waxman of the Bureau of Alcohol, Tobacco and Firearms testified that he attended the first meeting with Ordner on August 25, 1975 at Stagg's residence in Armonk, New York. Agent Waxman recalled that on this occasion Ordner said he might be able to renew certain contacts and to arrange the sale to Stagg in Canada of 300 Sten guns and carloads of ammunition. (Tr. 212-13).

Special Agent Vito DeMarco, also of the Bureau of Alcohol, Tobacco and Firearms, testified about a conversation he had had with Ordner on December 8, 1973, during the pendency of Ordner's application for a manufacturer's license for firearms. At that time Agent DeMarco specifically instructed Ordner on the Federal statutes and regulations requiring serialization of firearms. (Tr. 229-32).

The final witness called by the Government was Albert Gleason, an explosives expert with the Bureau of Alcohol, Tobacco and Firearms. On July 14, 1976, Gleason examined the three hand grenades which Ordner had delivered to Agent Kelly on November 8, 1975. Gleason had field tested two of the grenades by detonating them at a firing range in Banksville, New York. (Tr. 279,

283-89, 296-99). In Gleason's opinion, the grenades were expertly constructed and had been packed with a quantity of powder, far in excess of the amount required to make the grenades into explosive devices. (Tr. 297-98).

The Defendant's Case

1. Ordner's Testimony

Ordner took the witness stand and testified that he was a blaster by trade and that he attended the first meeting at Stagg's residence on August 25, 1975 at the suggestion of John Romano. Ordner maintained that at first he was hopeful of landing a blasting contract with Stagg (Tr. 324-36), but that he soon became frightened of Stagg. (Tr. 338). Ordner also maintained that at this first meeting he noticed a .32 caliber pen gun lying on a chopping block in Stagg's kitchen. (Tr. 340). He testified that the napalm compound, which was presented to Stagg that evening, actually belonged to Romano and was useful as a "sweeping compound." (Tr. 341-42). After the meeting, Ordner said, he considered calling the United States Attorney's Office, but decided not to. (Tr. 342-43).

Ordner maintained that Romano was thereafter constantly pressuring him for a list he could give to Stagg "of what you can supply." (Tr. 343-44). Ordner claimed that a second meeting took place at Stagg's residence on September 13, 1975, at which time Stagg asked Ordner to supply machine guns and silencers. (Tr. 347-51).

Ordner testified that he was scared when he met Stagg on September 23, 1975 after John Romano's wake. (Tr. 373-76). He admitted bringing a blueprint for the barrel for a pen gun to Stagg's home the following day,

but claimed that he was acting in fear. He alleged that Stagg threatened his life and the lives of his children, and that Agent Kelly brandished a knife at him. (Tr. 379-81, 385-87).

Ordner further maintained that he then attempted to contact an Assistant United States Attorney in Bridgeport, Connecticut, but did not leave a message when he was unsuccessful in reaching one. (Tr. 389).

Ordner admitted that he brought a pen gun (GX 2) to the Stagg residence on September 25, 1975, and claimed that he had obtained it from the work locker of the deceased John Romano. (Tr. 390-91). He admitted that he furnished to Kelly the name and address of a person in New Jersey who might have flare launchers for sale, and that he thereafter spoke with a Mr. Dolan on the telephone to confirm that the type of flare launcher in Dolan's stock was compatible with the pen gun barrel in Ordner's blueprint. (Tr. 399-405). Ordner testified that Stagg then asked him to provide silencers and automatic weapons, but he refused to do so. (Tr. 405-09).

Ordner also admitted that on another occasion he brought a semi-automatic pistol to Stagg, but denied that he had intended to sell it—insisting instead that Stagg confiscated the gun and forced him to take money for it. (Tr. 415-20, 422-23).

With respect to the October 7, 1975 trip to Neptune, New Jersey to purchase the flare launchers, Ordner maintained that he was taken on the trip over his objection, at the insistence of Agent Kelly and Police Officer Adams. (Tr. 426-27).

Ordner admitted that he delivered the barrels for the 502 pen guns to Stagg's home on October 16, 1975, that

he test fired ten of the completed gun guns in Stagg's backyard and that he received $1,050 in cash that evening from Agent Kelly; however, Ordner maintained that during the "manufacture" of the pen guns he merely watched as Kelly, Adams and Stagg screwed the barrels onto the flare launchers. (Tr. 430-35, 461-64).

Ordner further testified that his fears of Stagg were heightened in late October or early November, when he received word that an attempt had been made to abduct his daughter. Ordner testified that it was this fear that prompted him to manufacture and to deliver to Agent Kelly three hand grenades on November 8, 1975. (Tr. 428-29, 436-39).

On cross-examination, Ordner admitted, among other things, that he was aware of the serialization requirements of the federal firearms statutes (Tr. 452-53), and that he had not complied with any of the relevant federal registration and tax provisions in connection with his possession and transfer of the three hand grenades on November 8, 1975. (Tr. 467-68).

2. Other Defense Witnesses

Following his own estimony, Ordner called Peter DeRose as a witness. DeRose testified that sometime in mid-October 1975 he was told by Ordner of the death of John Romano and of Ordner's fears for his own life. At that time, when DeRose suggested that Ordner contact law enforcement agencies, Ordner said that he was afraid to go to the authorities. (Tr. 529-32).

Mr. Ronald Holleran testified that in the course of three or four conversations in September and October 1975, Ordner talked of his concern for his safety, due

to "some form of mob connection" and an attempt "to get to his daughter." (Tr. 541, 544).

Finally, Ordner called his daughter Catherine to the stand. She testified that in September or October 1975 she told her father a man had tried unsuccessfully to get her into his car. (Tr. 555-56).

The Government's Rebuttal Case

In rebuttal, the Government called Police Officer William Adams as a witness. Adams stated that at no time did anyone ever threaten Ordner in Adams' presence. (Tr. 564, 584-85). Adams further testified that on October 16, 1975, Ordner actively participated with Adams, Kelly and Stagg in the assembly of the 502 pen guns. (Tr. 578-79).

ARGUMENT

POINT I

Ordner Was Guilty on Count Three as an Aider and Abettor Without Regard to the Principal's Capacity to Commit the Crime.

Ordner claims that he should not have been prosecuted for aiding and abetting the possession of the 502 unserialed pen guns referred to in Count Three,* since

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* Evidence adduced during the Government's direct case most pertinent to Count Three established that Ordner initiated the proposal to deal in pen guns (Tr. 38-41, 53); he arranged to have the barrels of the pen guns manufactured (Tr. 39, 45-46, 105-07), he assisted Agent Kelly in finding a supplier of flare launchers (Tr. 45-46); he accompanied Agent Kelly to the supplier's home and advised Kelly in connection with the purchase

[Footnote continued on following page]

the possessors of these pen guns were themselves immune from prosecution by reason of their status as law enforcement officers. (Br. 12). Thus, essentially he contends that unless the principal had the legal capacity to commit the crime, Ordner could not be convicted as an aider and abettor. This argument is foreclosed not only by the very wording of Title 18, United States Code, Section 2(b), but by settled precedent rejecting analyses of aiding and abetting which turn on the guilt or innocence of the principal.

Title 18, United States Code, Section 2(b) provides:

> "Whoever willfully causes an act to be done *which if directly performed by him* or another would be an offense against the United States, is punishable as a principal." (Emphasis supplied.)

The Revisor's Note to that statute states that the language of the statute "removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty. . . ." Relying in part on that Revisor's Note, this Court in *United*

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of those flare launchers (Tr. 54-65; GX 6); he delivered the barrels for the pen guns to the Stagg residence and, with the help of Stagg, Kelly and Adams, assembled the pen guns by screwing the barrels onto the flare launchers (Tr. 105-08, 271-73, 578-80); Ordner test fired ten of the assembled pen guns in Stagg's backyard (Tr. 107-08, 271-73); and Ordner then received $1,000 as payment for the pen guns. (Tr. 108-09).

The Government contended at the trial below that this evidence proved that Ordner physically possessed a portion of the 502 pen guns referred to in Count Three, constructively possessed all of the pen guns and, at the very least, aided and abetted Agent Kelly's possession of these pen guns. (Tr. 238-47). Judge Ward ruled that he would submit Count Three to the jury only on the aiding and abetting theory. (Tr. 305-06).

States v. *Rapoport*, Dkt. No. 76-1291, slip op. 423, 430 (2d Cir., Nov. 4, 1976), recently reaffirmed that there is no "requirement that the intermediary be guilty." The rationale for this view of aiding and abetting was stated as follows:

> "Since the guilt or innocence of the intermediary is irrelevant to the moral culpability of the defendant, the sound administration of criminal justice would not be served by requiring judges to determine the validity of the myriad personal defenses and immunities which the intermediary might possess." *United States* v. *Rapoport*, *supra*, slip op. at 430.

This principle of law was also determinative of this Court's earlier decision in *United States* v. *Kelner*, 534 F.2d 1020 (2d Cir.), *cert. denied*, — U.S. — (Dec. 13, 1976). In *Kelner* the appellant had convened a press conference, at which he communicated to various news media a threat upon the lives of members of the Palestinian Liberation Organization. Following a television network broadcast of this press conference, Kelner was arrested and convicted of aiding and abetting the transmission in interstate commerce of a communication containing a threat. Kelner argued on appeal that because the television network that actually transmitted the threat was immunized from prosecution by reason of the First Amendment, Kelner could not have aided and abetted the commission of a crime. The Court held that an individual is criminally liable "if he is a cause in fact of the criminal violation, even though the result which the law condemns is achieved through the actions of innocent intermediaries." 534 F.2d at 1022. The Court went on to say that it did not have to decide whether the First Amendment immunized the television personnel, however: "Assuming that the First Amendment shields this form

of 'news publication,' Kelner's act is not cleansed of its criminality by his use of an immunized intermediary." 534 F.2d at 1023, n.3. See also *United States* v. *Kelley*, 395 F.2d 727, 729 (2d Cir.), *cert. denied*, 393 U.S. 963 (1968); *United States* v. *Scandifia*, 390 F.2d 244 (2d Cir. 1968), *vacated on other grounds sub nom. Giordano* v. *United States*, 394 U.S. 310 (1969).

Ordner attempts to distinguish *United States* v. *Kelner*, *supra*, by asserting that in *Kelner* "the principals innocently committed the offense charged" while in his own case "the principals, government law enforcement officers, commited no offense." (Br. 13) (emphasis omitted). This sematic distinction is without substance. The Court in *Kelner* did not decide that the offense was "innocently committed" by the intermediaries; rather, it decided that it did not have to determine whether the intermediaries were guilty or innocent, immunized or unimmunized, since the defendant's guilt is unaffected by the intermediaries' guilt or innocence.

Thus, under *Kelner* and *Rapoport*, Ordner's claim on this issue is untenable. The capacity of the law enforcement agents to commit the crime is entirely beside the point. His conviction as an aider and abettor is established by his acts in causing third parties—innocent or otherwise—to engage in acts which would be criminal if committed directly by him.

POINT II

Ordner's Status As a Licensed Firearms Manufacturer Does Not Render Him Immune From Prosecution For Aiding and Abetting The Possession of Unserialed Firearms.

Ordner next contends that he was invulnerable to prosecution for aiding and abetting others to possess the 502 unserialed pen guns referred to in Count Three, because he did not complete the process of manufacture and as a licensed manufacturer of firearms, he was entitled to possess unserialed firearms still in the process of being manufactured. This argument attempts to make Ordner's license a complete defense against the criminal charges of Count Three. The contention, while imaginative, overlooks the evidence which demonstrated that Ordner in fact participated in the manufacture of unserialed firearms and that his acts were far from the ordinary activities of a licensed manufacturer who has not yet put serial numbers on firearms which he is in the process of manufacturing.

First, as to Ordner's assertion that he "did not violate the applicable statutes and regulations in that he did not complete the process of manufacture," (Br. 18), this claim is simple contrary to the evidence. The evidence adduced by the Government at trial establishd that not only did Ordner design and supervise the manufacture of the barrels for each of the 502 pen guns, but he sat down with Government agents on the evening of October 16, 1975 and helped screw these barrels onto the flare launchers which had been purchased at his direction, thereby converting the flare launchers into .25 caliber pen guns. (Tr. 107-08, 271-73). At that point, the firearms had been manufactured and could not be legally

possessed under the provisions of 26 U.S.C. §§ 5842(b) and 5861(i) unless they bore serial numbers.* Consequently, when viewed in the light most favorable to the Government, this evidence established that Ordner did indeed violate the federal statutes applicable to the possession of firearms as well as those applicable to the manufacture of firearms.**

Furthermore, Ordner's suggestion that a licensed manufacturer of firearms should be immune from prosecution under the statutes that proscribe the possession of unserialed firearms (Br. 16) is concededly unsupported in law and is also, we submit, unsupported in logic. Were the law as Ordner postulates, any person who knowingly

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* Title 26, United States Code, Section 5842(b) provides as follows:

> "Firearms without serial number.—Any person who possesses a firearm, other than a destructive device, which does not bear the serial number and other information required by subsection (a) of this section shall identify the firearm with a serial number assigned by the Secretary or his delegate and any other information the Secretary or his delegate may by regulations prescribe."

Title 26, United States Code, Section 5861(i) provides in pertinent part:

> "It shall be unlawful for any person . . . (i) to receive or possess a firearm which is not identified by a serial number as required by this chapter. . . ."

** The requirement that licensed manufacturers must serialize the firearms they manufacture is set forth in Title 26, United States Code, Section 5842(a), which provides:

> "Identification of firearms other than destructive devices.—Each manufacturer and importer and anyone making a firearm shall identify each firearm, other than a destructive device, manufactured, imported, or made by a serial number which may not be readily removed, obliterated, or altered, the name of the manufacturer, importer, or maker, and such other identification as the Secretary or his delegate may by regulations prescribe."

and willingly assists another to possess unserialed firearms need only apply for, and receive, a manufacturer's license in order to become invulnerable from prosecution.

Very simply, Ordner's active assistance to others in their possession of unserialed pen guns constituted a federal criminal violation, without regard to whether Ordner was, or was not, licensed to manufacture firearms. The Court's submission of Count Three to the jury and the guilty verdict rendered as to that count were both amply justified and supported by the evidence presented during the trial.

POINT III

The District Court Properly Refused to Direct a Verdict of Acquittal Based upon Entrapment as a Matter of Law.

Ordner further contends that the Court below erred when it did not accept his claim that he had been entrapped as a matter of law. This claim on appeal is fashioned by presenting only the defendant's version of this issue and by ignoring the substantial evidence that emerged at the trial which contradicted the defense theory of the salient events.

Contrary to Ordner's assertion on appeal that "[t]he bulk of the defendant's testimony concerning incidents which gave rise to the prosecution were corroborated by witnesses for the Government" (Br. at 19), there was considerable disparity on the essential issues of inducement and predisposition. For example, although Ordner testified that he and his family had been threatened by Stagg, to induce him to supply weapons to Stagg's organization (Tr. 379-81, 385-87), Agent Kelly and Police Officer Adams testified that Ordner was never threatened. (Tr.

204-06, 584-85). Similarly, Ordner's testimony at trial that he was driven to Neptune, New Jersey over his objection was contradicted by a statement he made to Agent Kelly during the trip itself—a statement which indicated that Kelly was making the trip at Ordner's request. (GX 6, at 105). Furthermore, the testimony of Agent Kelly also established Ordner's predisposition to commit these offenses in that it was Ordner who first mentioned pen guns and hand grenades as items he could supply to Stagg. (Tr. 38-41, 53, 110).

This was clearly not a situation like that in *Sherman* v. *United States*, 356 U.S. 369 (1958), on which Ordner so heavily relies. *Sherman* presented a virtually unique situation in which the proof of entrapment in a criminal trial arose entirely from the uncontradicted testimony of the prosecution's own witnesses. In finding entrapment as a matter of law, the Supreme Court in *Sherman* noted that its conclusion was possible only because it was not called upon to choose between the testimony of conflicting witnesses, or to judge the credibility of defense witnesses. *Sherman* v. *United States*, *supra*, 356 U.S. at 373.

By contrast, the issue on entrapment in this case turned entirely on the question of the credibility of the witnesses presenting divergent versions of the same events. The District Court properly recognized that entrapment as a matter of law was not shown and correctly submitted the issue to the jury. See *United States* v. *Weiser*, 428 F.2d 932, 935 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971).

POINT IV

The Court Below Did Not Abuse Its Discretion When It Admitted Into Evidence a Tape Recording of the October 7, 1975 Meeting.

Ordner also assigns as error the admission into evidence of Government's Exhibit 5—the tape recording containing conversations among Ordner, Special Agent Kelly and Police Officer Adams recorded during their October 7, 1975 automobile trip from Armonk, New York to Neptune, New Jersey, and back. This trip was made approximately two weeks after Ordner possessed and transferred the first unserialed pen gun referred to in Counts One and Two; it was undertaken to purchase the flare launchers that were ultimately converted into the unserialed pen guns referred to in Counts Three and Four. Ordner asserts that the conversations recorded during the trip were irrelevant to the issues in the trial and that the playing of this tape was unfairly prejudicial. (Br. 25).

The claim of prejudice raised in this Court is premised upon Ordner's assertions that "[i]n the recorded conversation the defendant recounted the multitude of firearms and destructive devices with which he had become acquainted in his long career in the firearms industry" (Br. 25) and that "the tapes . . . can only prove that the defendant was familiar with firearms." (Br. 29). In truth, the tape reveals much more than Ordner claims it does. During the three hours of conversations recorded on Exhibit 5, Ordner *offered to sell* to Agent Kelly a veritable arsenal of weapons—weapons such as sawed-off shotguns, satchel bombs, exploding light bulbs and machine guns, as well as the pen guns and hand grenades, which, of course, were the subject of the instant indict-

ment. It is difficult to imagine evidence more probative of Ordner's knowledge and intent to carry out his plan to deal illegally in firearms with Stagg and Kelly. Moreover, Ordner's initiation of each of the various proposals contained on this tape is particularly relevant to the defenses of entrapment and duress which Ordner interposed at the trial below.*

Ordner's argument based on Rule 404(b) of the Federal Rules of Evidence that this tape was offered simply to prove *other* crimes, wrongs or acts—an argument raised for the first time on appeal—is equally unavailing. Ordner overlooks the fact that he discussed at length on this tape the very crimes with which he is charged in this indictment. To the extent that he discussed his intent to commit crimes not charged in the indictment, he has waived any right to now object to the admission of this evidence, having failed to seek a redaction of the tape in the District Court.

Regardless, Rule 404(b) expressly provides that evidence of other crimes, wrongs or acts is nonetheless ad-

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* Conceding that the tape may have been relevant to Counts Three and Four, Ordner then argues that it "clearly had no relevance to the remaining Counts." (Br. 28). This argument reflects a too narrow view of relevance. Ordner's October 7, 1975 proposal to supply Kelly with weapons—including pen guns and hand grenades—bears directly upon his criminal state of mind in possessing and delivering to Agent Kelly the particular pen guns relevant to Counts One, Two and Three and the particular hand grenades relevant to Counts Five and Six. See *United States* v. *Campanile*, 516 F.2d 288, 292-93 (2d Cir. 1975); *United States* v. *Johnson*, 382 F.2d 280 (2d Cir. 1967). In addition, this tape was clearly probative of Ordner's uncoerced association with the Stagg "organization" and his predisposition to commit each crime charged in this indictment. See *United States* v. *Russell*, 411 U.S. 423 (1973); *Sherman* v. *United States*, 356 U.S. 369 (1958); *United States* v. *Koska*, 443 F.2d 1167, 1169 (2d Cir.), *cert. denied*, 404 U.S. 852 (1971).

missible if, like Government Exhibit 5, it is relevant to "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." There can be no doubt the tape was relevant to these issues. Ordner's statements on the tape demonstrate the extensive and continuing criminal scheme he was planning, of which the acts charged in the indictment were to be put a part. Proof that Ordner intended to commit other crimes as part of this general plan was clearly admissible since those crimes were to be closely connected in time and circumstance with the crimes charged in the indictment. See *United Statse* v. *Grady*, Dkt. No. 76-1201, slip op. 291, 302 (2d Cir., Oct. 27, 1976); *United States* v. *Light*, 394 F.2d 908, 912-13 (2d Cir. 1968). Consequently, the ruling of the Court below admitting Exhibit 5 was clearly correct.

POINT V

The Form of the Jury's Verdict and the Manner by Which It Was Reached Were Entirely Proper.

Finally, Ordner contends that because the jury found him guilty of Counts One, Two and Three and not guilty of Counts Five and Six ("based upon the defense of entrapment"), this verdict was "clearly inconsistent." (Br. 30). Ordner argues that "[s]ince the offenses grew out of the same transaction and inducement by the Government, the verdict was legally inconsistent and ought to have been set aside." (*Id.*). This contention is not supported in fact or in law.

Ordner is factually incorrect when he claims that "[t]here was no construction of the facts which could have been employed to arrive at the split verdict reached by the jury." (Br. 31). At the trial, Ordner relied not only upon the defense of entrapment, but also upon a

defense of duress. By Ordner's own testimony, it appears that the attempted abduction of his daughter, which formed the basis for his claim of duress, took place *after* the events alleged in Counts One, Two and Three, but *before* those alleged in Counts Five and Six. (Tr. 437-39). Consequently, it is entirely conceivable that the jury accepted Ordner's claim of duress and concluded that this claim constituted a defense only to Counts Five and Six.

Moreover, regardless of the reasonableness of Ordner's claim that the jury's verdict was inconsistent, that claim is legally insufficient to support an appeal of that verdict to this Court. Both this Court and the Supreme Court have held on numerous occasions that an appellate court will not probe behind a verdict based on sufficient and properly admitted evidence, to determine the verdict's "consistency." *Hamling* v. *United States*, 418 U.S. 87, 100-01 (1974); *Dunn* v. *United States*, 284 U.S. 390 (1932); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir. 1974); *United States* v. *Handel*, 464 F.2d 679 (2d Cir.), *cert. denied*, 409 U.S. 984 (1972); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967); *United States* v. *Magnus*, 365 F.2d 1007 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967); *Steckler* v. *United States*, 7 F.2d 59 (2d Cir. 1925). Certainly, a conviction on one count is not to be overturned simply because the jury rendered a verdict of acquittal on another count, even though at the trial the defendant raised the same entrapment defense to both counts. See *United States* v. *Oquendo*, 505 F.2d 1307 (5th Cir. 1975).

CONCLUSION

The judgment of conviction should be affirmed.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JAMES A. MOSS being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of December, 1976, he served ~~two copies~~ of the within brief by placing the same in a properly postpaid franked envelope addressed:

Charles J. Irwin, Esq.
Irwin & Post
744 Broad Street
Newark, New Jersey 07102

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing ~~at~~ the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

James A. Moss
A.U.S.A.

Sworn to before me this
20th day of December, 1976
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 19[illegible]